

2005 WL 6314115 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Mississippi.  
Grenada County

Cephus COLEMAN, III, as Personal Representative Of Cephus Coleman, Jr., Deceased and  
on Behalf Of the Wrongful Death Beneficiaries Of Cephus Coleman, Jr., Deceased, Plaintiffs,

v.

GRENADA LIVING CENTER LLC, et al, Defendants.

No. 2004-0437CVM.  
October 25, 2005.

**Plaintiff's Memorandum Regarding Arbitration Agreement**

Cephus Coleman, III (Substituted for Anne Donaldson), as Personal Representative Of Cephus Coleman, Jr., Deceased and on Behalf Of the Wrongful Death Beneficiaries Of Cephus Coleman, Jr., Deceased, Charles E. Gibson III, Gigi Gibson, Of Counsel: Charles E. Gibson III, MB# 4821, Gigi Gibson, MB # 100540, Edward Gibson MB# 100640, The Gibson Law Firm, 447 Northpark Drive, P.O. Box 6005, Ridgeland, MS 39158-6005, Telephone: 1-601-957-6010, Facsimile: 1-601-957-6065.

COMES NOW, the Plaintiff, pursuant to this Court's Order of March 23, 2005, and files this Memorandum regarding the arbitration provision contained in the alleged admission agreement, as follows:

**PROCEDURAL BACKGROUND**

This suit was filed on August 27, 2004 by Anne Donaldson, as personal representative of Cephus Coleman, Jr., Deceased, and on behalf of the wrongful death beneficiaries of Cephus Coleman, Jr., Deceased. The suit alleges negligence and gross negligence on the part of the Defendants which caused the personal injury and wrongful death of Cephus Coleman, Jr. while a resident at Grenada Living Center.

Through discovery, counsel for Plaintiff learned that Cephus Coleman, III, hereinafter Pete, is the son and sole living heir of Cephus Coleman, Jr. and the proper person to bring this lawsuit.<sup>1</sup> Pete was substituted as personal representative by Order of the Court dated March 24, 2005.

Defendants filed their Motion to Compel Arbitration on October 29, 2004 which is based on an alleged agreement to arbitrate this matter in accordance with the American Health Lawyers Association Dispute Resolution Service Rules of Procedure for Arbitration between Cephus Coleman, Jr. and Grenada Living Center. A copy of these Rules has been attached hereto as Exhibit G.

On March 23, 2005, this Court entered an Order Allowing Discovery on the limited issue of the validity of the arbitration agreement and directing the parties to file memoranda of law on this issue within 30 days after completion of discovery.

Discovery was completed with the deposition of Cephus Coleman, III on July 11, 2005. The parties agreed to extend the deadline for submission of memoranda of law until October 25, 2005.

**FACTUAL BACKGROUND**

## **I. The Facts Surrounding the Admission of Cephus Coleman, Jr. to Grenada Living Center.**

The following background is essential to an understanding of the events of July, 2003 when Anne Donaldson placed Cephus Coleman, Jr., her half-brother, in the Grenada Living Center signing the Admission Agreement with the Arbitration Provision.

In the 1940's, Japanese shrapnel wounded 18-year-old Cephus Coleman, Jr. (hereinafter "Cephus") paralyzing him on his right side for life.<sup>2</sup> At the end of World War II, he returned to the States, attained a Bachelors Degree from Tennessee State University, married at the age of 30 and had one child, a son, named after him, Cephus Coleman, III, that everyone called Pete.<sup>3</sup>

Cephus Coleman, Jr.'s father, Cephus Coleman, Sr., had also been a minister and had owned his own home in Grenada, Mississippi, where he fathered four children: Cephus, Jr. and Rosa Higgs were born to Cephus, Sr. and his first wife, Estella Hart. Following Estella's death, Cephus, Sr. remarried. Cephus, Sr. then had two more children with his second wife, Emma Coleman. Those children are Anne Coleman Donaldson and Davenport Coleman.<sup>4</sup> Cephus Coleman, Sr., died without a surviving spouse or will, leaving the family home in Grenada through intestate secession, to his four children. [Miss.Code Ann. §91-1-3](#). Rosie, now deceased, lived in Cleveland, Ohio. Davenport, Anne's full brother, settled in Chicago, Illinois. Only Cephus, Jr. and Anne remained in Mississippi. Anne assumed possession of the family home.<sup>5</sup>

Cephus, Jr. moved to Tupelo and pastored a church. Although wheelchair bound after World War II, he was fully competent and totally self sufficient. He worked as a minister for many years. In addition, he received financial support as a 100% Disabled American Veteran.<sup>6</sup>

When Cephus, Jr.'s wife died, he continued to live independently with the aid of a paid driver and caretaker. Throughout his life he maintained a close relationship with his son Pete. When Pete and Cephus, Jr. began to feel that the caretaker was taking financial advantage of the situation, he was discharged.<sup>7</sup> Pete and his wife, Coletta, stepped in to help.<sup>8</sup>

Cephus and Pete planned to get a V.A. loan to purchase a home in Grenada near the family home. They contacted the Coldwell Banker Realty Office in Grenada and began making arrangements.<sup>9</sup> They also contacted Anne Donaldson, Cephus' half-sister, and she agreed to let Cephus live with her while they found a house to buy in Grenada.<sup>10</sup>

On the day of the move, Pete and his wife, Colleta, spent all day in Tupelo with Cephus packing his belongings. The packing lasted far into the evening. Cephus, Pete and Colleta arrived at the family home at 58 Springhill Road in Grenada at approximately 2:00 in the morning."<sup>11</sup>

Tensions began. Anne felt crowded and was upset by the middle of the night arrival. Although she had been told in advance that they were coming and had agreed, she resented it. Even though Cephus owned an interest in the family home, she had lived there for many undisturbed years. The middle of the night intrusion by her half-brother, Cephus, Jr., 19 years her senior, and his son, Pete, and Pete's wife, Coletta was just to much. Anne decided that her mental and physical health couldn't take it.<sup>12</sup>

Anne Donaldson's grown son, Antonio, came to 58 Springhill Road on July 7, 2003. On that date, an altercation ensued between he and Pete, a firearm was discharged and Pete was arrested. Petey was held in the Grenada County jail for the following 3 weeks.<sup>13</sup>

While Pete was in jail, Anne Donaldson contacted the V.A. and found out which nursing homes were in the area that would accept V.A. benefits. There was only one, Grenada Living Center.<sup>14</sup> Anne knew where Pete could be found but she failed to contact him to advise him of her intentions to put Cephus in a nursing home.<sup>15</sup>

It was not Cephus Coleman, Jr.'s intention to be placed in a nursing home. Nor did his son Pete consent to his father being admitted to the Grenada County Living Center. When asked in his deposition if he would have chosen a nursing home in Grenada for his father, Pete responded, "I wouldn't have put him anywhere in a nursing home, period. I would have carried him on my back first."<sup>16</sup> When Pete was jailed, his wife, Colleta, stepped forward to offer her services in taking care of Cephus. Anne rebuked Colleta's attempts to help.<sup>17</sup>

Anne and Jackie Box, an employee of the Grenada Living Center, made all the arrangements for Cephus to be admitted and for all of his V.A. benefits to be forwarded directly to the nursing home.<sup>18</sup>

On July 21, 2003, at the direction of Jackie Box, the Grenada Living Center Representative, Anne Donaldson signed the Admission Agreement which included the Arbitration Clause and placed Cephus, her much older half-brother, in the Grenada Living Center.<sup>19</sup> Anne signed the admission documents outside of Cephus's presence, leaving him at home while she went to the nursing home.<sup>20</sup> No witnesses were present for the signing as was required by Grenada Living Center's Policy.<sup>21</sup>

No physician had found Cephus to be incapable of managing his own affairs, much less two as is required by [Miss Code Ann. § 93-13-259](#). In fact, Cephus, Jr. had managed his own affairs quite successfully for years, using a driver for transportation and paying a caretaker with a portion of his V.A. benefits.<sup>22</sup> There was no guardianship or conservatorship in place.<sup>23</sup> Although he was completely competent, did all of his own banking and managed all of his own affairs,<sup>24</sup> Cephus was never shown the Admission Agreement.<sup>25</sup> The Admission Agreement was signed only by Anne Donaldson and Jackie Box, the Social Services Director for the facility at that time.<sup>26</sup>

Evidence indicates that Cephus, although wheelchair bound and in need of assistance, was fully competent to conduct his affairs on July 22, 2003 when Grenada Living Center sent its company van to 58 Springhill Road. The nursing home representative that signed the Admission Agreement, Jackie Box, the Social Services Director for Grenada Living Center, states that she did not assess his mental competency prior to admission. She goes on to say that if he had ever been adjudicated to be incompetent or incapable of handling his own affairs that she was not aware of it.<sup>27</sup> No guardianship or conservatorship proceedings were done at any time by Anne Donaldson to obtain authority over the person and property of Cephus Coleman, Jr. prior to his admission to Grenada Living Center. Nor, did Grenada Living Center require any such documentation. The staff at Grenada Living Center did no physical or mental evaluation prior to sending their van to pick him up. Jackie Box, the social worker and Grenada Living Center's representative did not meet Cephus, Jr. prior to the day of his admission. No one at the Grenada Living Center met Cephus, Jr. prior to his admission to Grenada Living Center.<sup>28</sup> The Grenada Living Center did not ask to see conservatorship or guardianship papers authorizing Anne Donaldson to commit him to Grenada Living Center. Nor did they ask to see a power of attorney prior to taking Cephus against his will to their facility.<sup>29</sup>

**Cephus had all of his mental faculties and signed his own signature using his left hand<sup>30</sup> but he did not sign the Admission Agreement.**<sup>31</sup> Jackie Box did not show Cephus, Jr. the Admission Agreement. The Administrator of the Grenada Living Center, James Williams, testified in his deposition, that after Cephus became a resident, he found him to be a very smart guy and stated that as far as he knew he was not presented with any papers indicating he was adjudicated incompetent.<sup>32</sup> James Williams did not have Cephus sign the Admission Agreement. He did not give Cephus a copy of the Admission Agreement. With full knowledge that Cephus had never been adjudicated incompetent and did not want to be at the Grenada Living Center, James Williams kept him there until he died.<sup>33</sup>

It was not Cephus' intention to reside at the Grenada Living Center.<sup>34</sup> In deposition testimony, Pete was asked by counsel for the Grenada Living Center if his daddy had said, "Son, take me out of this nursing home. Ms. Donaldson put me here against

my will.” Pete replied under oath that his father had said, “yes” and that his father had asked him to take him away from the Grenada Living Center.<sup>35</sup>

Pete tried to take his father out of the Grenada Living Center. He asked to have his father released into his custody. They refused. The Grenada Living Center had listed Anne Donaldson as the responsible party. Only Anne Donaldson could have him released. When Pete attempted to contact Anne, she hung up on him repeatedly.<sup>36</sup> Pete was afraid to go back to 58 Springhill Road to talk to her personally fearing that he would be arrested again.<sup>37</sup>

Pete strenuously objected to the Administrator at the Grenada Living Center. In fact, too strenuously. On October 8, 2003, Pete was escorted from the premises of the Grenada Living Center by the Sheriff's Department.<sup>38</sup> Cephus was not released.<sup>39</sup>

Cephus had a lifetime benefit contract with the V.A. that the Facility was receiving. There was no other facility in the area that had contracted with the V.A. and Grenada Living Center's records listed Anne Donaldson as the responsible party and personal representative.<sup>40</sup> Finally, Antonio Donaldson, Anne's son, was listed as the second contact in the paperwork of the Grenada Living Center. Nowhere, was there mention in the Grenada Living Center documents of Pete as the responsible party.

Pete and Colletta contacted the Mississippi State Nursing Home Ombudsman. The Ombudsman, Mary H. Smith, personally visited Cephus at the Grenada Living Center and wrote a letter regarding Cephus. According to the letter written by the Ombudsman, Cephus was oriented, alert and very personable. It is clear that he did not want to reside at Grenada Living Center. He had every intention of leaving with Pete.<sup>41</sup>

Cephus, Jr. referred to living at Grenada Living Center as “being in prison.” It was a life sentence. Before Pete could get his father out of the Grenada Living Center, his father was dead.<sup>42</sup>

It is against this factual background that we must analyze the Arbitration Provisions embedded in the Nursing Home Admission Agreement made between Anne Donaldson and Grenada Living Center.

## **II. The Facts Pertaining to the Admission Agreement.**

The Admission Agreement was crafted in its entirety by attorneys employed by Grenada Living Center. It was signed only by Jackie Box, the nursing home's paid representative and by Anne Donaldson, Cephus Coleman, Jr.'s half-sister.

The Admissions Agreement, a copy of which is attached hereto as Exhibit B, is a seven (7) page standardized form incorporating by reference only the American Health Lawyers Association Rules and Regulations Regarding Arbitration and Mediation that the Grenada Living Center uses when admitting a resident to the facility. The Admissions Agreement opens with a clause that binds all parties identified and signing below as co-responsible parties agreeing to all of the terms and provisions. It is of note that only Anne Donaldson and Jackie Box signed the document. The document attempts to bind Cephus Coleman, Jr. because he was “identified” in the document when Jackie Box, wrote in his name. It also attempts to bind all the Wrongful Death Beneficiaries that are neither identified in the document nor are signatories.

Anne Donaldson was not given a copy of the American Health Lawyers Association Rules and Regulations regarding Arbitration and Mediation. Nor were they explained to her by Jackie Box.<sup>43</sup> Cephus Coleman was never given these documents nor was he aware of their existence. Pete was also not apprised of their existence until after his father's death.

Attached as Exhibit E, is a detailed analysis of the Admissions Agreement.

## APPLICABLE LAW

### I. Is the Grenada Living Center's Admission Agreement Void?

#### Formation of a Contract

The *Encyclopedia of Mississippi Law* by Jeffrey Jackson and Mary Miller states the black letter law as follows:

##### §21:1 Mutual Consent

The parties to a contract must come to an agreement on all essential elements of a contract for it to be enforceable. This is what is known as “a meeting of the minds,” and is a prerequisite to contract formation. A party cannot be held to have contracted if there was no assent.

Cited in support for §21:1, Jackson and Miller point to *Hunt v. Davis*, 45 So. 2d 350, 352 (Miss. 1950) and *Brooks v. Brooks*, 111 So. 376, 376 (Miss. 1927). This principle of assent or “meeting of the minds” is established and well settled Mississippi law. For a more recent case see *Vinerette v. State Hwy. Comm'n of Miss.*, 656 So. 2d 102, 103 (Miss. 1995).

The facts of this case are clear. The proper party to contract with the Grenada Living Center was Cephus Coleman, Jr., and only Cephus Coleman, Jr. As such, any contract made on his behalf without his consent and agreement is not binding. As §21:1 states clearly, “A party cannot be held to have contracted if there was no assent.”

There is no showing of any assent by Cephus Coleman, Jr. He did not sign the contract.<sup>44</sup> He was not present when it was signed.<sup>45</sup> The Admission Agreement was never shown to him.<sup>46</sup> Nor did he at any time ratify the contract.<sup>47</sup>

Analyzing whether there was a contract entered into by Cephus, we must look to basic contract law in Mississippi, which requires that there be a meeting of the minds or that both competent parties assent to the contract. In a written contract, assent is evidenced by the signatures of the parties. Here, the signature of Cephus Coleman, Jr. is totally absent. What else is claimed to evidence or manifest his agreement to this alleged contract? There is no act which evidences his intent to be bound by this alleged agreement. He was quite simply held against *his* will by the Grenada Living Center until he died.

The Admission Agreement was signed by his half-sister, Anne Donaldson, the day before he was picked up by the Grenada Living Center van and taken to the Facility.<sup>48</sup> There is no showing of any sort that Anne Donaldson had any authority to sign for her half-brother. His primary caretaker, his son, Pete, had been placed in jail by Anne Donaldson.<sup>49</sup> Cephus, Jr. was not present when the contract was signed.<sup>50</sup> It is clear from the testimony of the employees of the Facility that the contract was never shown to Cephus Coleman.<sup>51</sup> Cephus was never asked to sign the Admission Agreement, even though the Social Services Director and the Administrator of Grenada Living Center were aware that he was mentally competent and capable of understanding the terms of the contract.<sup>52</sup>

It is clear that Cephus did not want to reside at Grenada Living Center. After he was forcibly taken to Grenada Living Center, Cephus repeatedly expressed a desire to leave the Facility with his son, Pete.<sup>53</sup> There is no testimony whatsoever to establish that Cephus Coleman, Jr. (1) was shown the Admission Agreement; (2) signed the Admission Agreement; or (3) expressed any assent to the terms of the alleged contract. In fact, the testimony of Jackie Box and James Williams confirms he was never shown the contract in any form even though they knew him to be competent.

Cephus Coleman, Jr. did not receive the benefit of the bargain. Cephus was actively held against his will. While it is true that he received food and housing, he was a competent man who was held against his will in a nursing home. It is ludicrous to say that a

kidnap victim is receiving a benefit of food and shelter even if he is kept in palatial surroundings, which these were not. Cephus Coleman, Jr. was unwillingly taken to the Grenada Living Center. Although wheelchair bound, he was mentally competent and capable of managing his own affairs. Six months later he was dead.

The Admission Agreement is riddled with fatal flaws. Anne Donaldson and Grenada Living Center contracted to detain Cephus Coleman, Jr., a third party, against his will. It is well established law that an agreement to commit a tort or crime is void.<sup>54</sup> A void contract is totally without any legal effect from the beginning. The entire agreement dies at inception. The death of the agreement in its entirety carries with it the terminally flawed arbitration provision.

There is no mutual assent between the parties to the agreement that might lend credence to its viability. Mutual assent or a "meeting of the minds" requires at the very least that the proper parties be seated at the table. While it is true that a designated agent can sit for a party, Anne Donaldson did not have any authorization from Cephus to contract away his rights. At no time did Cephus Coleman, Jr. designate Anne Donaldson to act on his behalf. Nor did Grenada Living Center with full knowledge of his competency, have any grounds to accept Anne Donaldson as Cephus Coleman, Jr.'s agent acting on his behalf.

There is no valid contract. The proper party to sign the underlying Admission Agreement was Cephus Coleman, Jr., not Anne Donaldson. Cephus was capable of understanding, he was fully cognizant, had no diminished mental capacity in any way when he was admitted to the Grenada Living Center. The contract is void *ab initio*, or from the beginning and with it dies the arbitration provision.

## II. Is the Arbitration Provision as presented in this Admission Agreement Enforceable?

The litmus test for judging the validity of the contract to arbitrate under the Federal Arbitration Act is set forth in 9 USCS § 2 which reads in relevant part:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In *Doctors Associates, Inc., et al v. Paul Casarotto*, 517 U.S. 681 (1996), the U. S. Supreme Court held that the "general applicable contract defenses, such as fraud, duress or unconscionability may be applied to invalidate arbitration agreements without contravening §2."<sup>55</sup> The case before the Court today, satisfies all the elements for procedural and substantive unconscionability.

**Unconscionability:** "Unconscionability has been defined as 'an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.'"<sup>56</sup>

**(1) Absence of Meaningful Choice:** "[A]rbitration is a creature of contract and one cannot be compelled to arbitrate unless he has agreed to do so;..."<sup>57</sup>

Much can be said about the absence of meaningful choice by Cephus Coleman, Jr. Cephus Coleman, Jr. was detained in the nursing home by his half-sister Anne Donaldson acting in concert with Grenada Living Center. Both Anne and Grenada Living Center stood to gain by his detention. Anne didn't have to worry about sharing her home with him. Grenada Living Center got a lifetime contract with no possibility of an aged outstanding balance. He did not agree and was held against his will until his death.<sup>58</sup> It is not that Cephus had no meaningful choice. Cephus had no choice at all. Nor did Pete. Pete was physically jailed for three weeks while the Grenada Living Center in conjunction with Anne Donaldson got his father entrenched in the

Facility.<sup>59</sup> Even Anne had no meaningful choice in the selection of the Grenada Living Center. The Grenada Living Center was the only game in town. No other nursing home would accept V.A. benefits as compensation.<sup>60</sup>

## **(2) Contract Terms Unreasonably Favorable to the Other Party:**

The terms of the Admission Agreement (Exhibit B) are grossly one sided requiring private duty nursing with a hold harmless provision. The terms of the Agreement allow the Grenada Living Center to pursue a judgment against the Resident or his Personal Representative through the court system but disallow prosecution by the Resident or his Personal Representative for Wrongful Death or Personal Injury.<sup>61</sup> The only avenue of recovery afforded to the injured Resident is through the Arbitration Provision which is unduly biased in favor of the Health Care Defense Industry.<sup>62</sup> The selection of the Arbitration Forum is mandated by the Grenada Living Center Admission Agreement to be in compliance with the American Health Lawyers Association which is funded by Health Industry Defense Counsel.<sup>63</sup>

The language of the Arbitration Provision is obscure and misplaced throughout the document. The Arbitration Provision is referenced in multiple places in the Admission Agreement embedded in other non-related language.<sup>64</sup> Jackie Box, the employee hired by the Grenada Living Center to explain the provision to the Resident and the Personal Representative, was incapable of explaining the provision, stating in her deposition that she had never even read it herself.<sup>65</sup>

Anne Donaldson did not receive a copy and had no way of attaining a copy. The arbitration rules were only available through the AHLA website. Anne Donaldson did not have a computer. Cephus Coleman, Jr. and Pete certainly were not afforded this opportunity.

Courts have refused to enforce arbitration where the provision for arbitration contained a forged signature of one of the parties. Such agreement was void *ab initio* under New York law.<sup>66</sup> The Admission Agreement documents were fraudulently completed by Grenada Living Center. Jackie Box testified that she, not Anne Donaldson, physically wrote in Anne Donaldson's and Cephus Coleman's signatures on page 6 of the Admission Agreement. This page of the Admission Agreement where Jackie Box completed the form allows the release of all medical records that relate to Cephus Coleman, Jr. and serves as confirmation that he received the mandatory Statement of Resident's Rights.<sup>67</sup> Cephus was not present at that meeting between Jackie Box and Anne Donaldson to agree to having his medical records transferred or to receive the Statement of Resident's Rights.

Anne Donaldson did not have expressed authority to bind Cephus Coleman, Jr.<sup>68</sup> Anne Donaldson did not have expressed authority to bind Pete.<sup>69</sup> It is not reasonable to believe that Grenada Living Center found that Anne Donaldson had implied or apparent authority to bind the other parties that they attempt to hold to the contract because they knew of Cephus's competency, ability to sign and desire to leave. Grenada Living Center cannot argue that Anne Donaldson had implied or apparent authority: (1) Cephus Coleman, Jr. clearly stated that he did not want to be there;<sup>70</sup> (2) Pete attempted to have his father extricated from the facility;<sup>71</sup> (3) Grenada Living Center believed him to be competent;<sup>72</sup> and (4) there was no adjudication of incompetency by the Court.<sup>73</sup>

Our Supreme Court has found that “[f]raud vitiates everything it enters into. The contract and notes which were the basis of this suit, having been procured by fraud, are void in all their provisions.”<sup>74</sup>

## **Procedural Unconscionability:**

“ ‘Knowing and voluntary’ is an element of procedural unconscionability.”<sup>75</sup> For a waiver of a fundamental right such as a jury trial in favor of arbitration the Court must find that a knowing, voluntary and intelligent waiver was made by the parties.

“Procedural unconscionability may be proved by showing ‘a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms.’”<sup>76</sup>

Analyzing each element of a valid waiver individually and applying the facts of this case we find:

**Knowing** - Cephus Coleman, Jr. was not even shown the Admission Agreement which included the Arbitration Provision nor was he told of the Arbitration Provision. Pete was not shown the Admission Agreement until his deposition in this matter regarding the arbitration provision. Neither of these parties could have made a knowing waiver of a contractual provision that they did not know existed.

There was no opportunity to study the Admission Agreement in its entirety because the American Health Lawyers Association Rules and Regulations Regarding Arbitration and Mediation were not provided to any of the parties.<sup>77</sup> The arbitration provision was not explained to any of the parties, not even to Anne Donaldson because Jackie Box with the Grenada Living Center had never even read them herself so she did not know what they said.<sup>78</sup>

**Voluntary** - Neither Cephus Coleman, Jr. nor Pete agreed to the confinement at Grenada Living Center.<sup>79</sup> Neither Cephus nor Pete agreed to the Admission Agreement.<sup>80</sup> In fact, both of these non-signatories to the document were actively trying to undo the Admission contract in its entirety and secure Cephus's release from day one.<sup>81</sup> They could not have voluntarily agreed to the arbitration provision.

**Intelligent** - This facet for a valid waiver is predicated on the presumption that the parties at least knew of the existence of the Arbitration Provision. In this case, Cephus Coleman, Jr was never allowed to even see the document in question. He had no knowledge of the arbitration provision.

“Procedural unconscionability may be proved by showing ‘a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex or legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms’.”<sup>82</sup>

This arbitration clause seeks to bind non-signatories to the contract that did not receive a benefit from the agreement and at all times were unwilling to contract. The arbitration clauses are in the agreement in the exact type face and font size as other verbage in the agreement.<sup>83</sup> The language is legalistic in nature with sentence structure that defies understanding.<sup>84</sup> There is a gross disparity in bargaining power and sophistication of the parties. The agreement written by attorneys for Grenada Living Center on the one hand and Cephus Coleman, Jr., a disabled American veteran that was not allowed to even see the document in question on the other hand. At no time did a fully competent Cephus or Pete agree to this document. The contract was not signed by the proper parties to the Agreement to make it a valid contract. Cephus Coleman, Jr. was competent and capable of signing his complete name with his left hand. He did it all the time. He did not agree to this confinement. The Southern District of New York has held on this issue that “[a]rbitration cannot be compelled based on implied or even oral consent, but only on the basis of written agreement. . .”.<sup>85</sup>

The Admission Agreement with the embedded Arbitration Provision operated as an adhesion contract. It was offered on a take it or leave it basis. There was no other facility in the area that would accept a V.A. benefit assignment. Anne Donaldson had no bargaining power. Cephus Coleman had no bargaining power. Pete had no bargaining power.

“The fact that an arbitration agreement is included in a contract of adhesion renders the agreement procedurally unconscionable only where the stronger party's terms are unnegotiable and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.”<sup>86</sup> In

the case before the Court today, all of these elements are satisfied. No bargaining power by the weaker party coupled with non-negotiable terms presented by Grenada Living Center with the arbitration provisions embedded in multiple places in the document clouded in obscure legalistic jargon offered by the only institution that would accept V.A. benefits for compensation. This is a classic case of procedural unconscionability.

### **Substantive Unconscionability:**

“Substantive unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies.”<sup>87</sup> The Arbitration provision in the alleged contract dictates that the American Health Lawyers Association Rules for Mediation and Arbitration be used in lieu of the courts for any grievance other than the collection of an overdue balance.<sup>88</sup> The arbitration is physically to be held at the Grenada Living Center unless the parties agree to some other location.<sup>89</sup> This forum selection is inherently biased against the Resident and or his family asserting a grievance.

“Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive.”<sup>90</sup> Secret rules by their very nature are oppressive. Cephus had no knowledge of these rules. The family of Cephus Coleman, Jr had no knowledge of these rules at the time of the signing. They were not provided a copy of the arbitration rules. They had no way to get a copy. Attached hereto as Exhibit G is a copy of the American Health Lawyers Association Rules and Regulations relating to arbitration attained by counsel for the Plaintiff as part of the discovery process in this case.

While “procedural unconscionability is applicable to the overall formation of the contract ...substantive unconscionability is applicable only to the subject clause (such as the arbitration clause) itself.”<sup>91</sup> In *East Ford*, 826 So. 2d 709 (Miss. 2002), the analysis applied by the Court relying on the Federal Arbitration Act used a two pronged test to determine the validity of an arbitration clause.<sup>92</sup>

First, did the parties agree to arbitrate the dispute in question?<sup>93</sup> Applying these facts to this law, it is clear that Cephus and Pete did not agree to arbitrate this question or any other question with Grenada Living Center. They did not sign the agreement nor did they agree to it verbally or ratify it in any way following the wrongful admission of Cephus to the Facility. There are two evaluations made under this first prong.

Recent cases hold that the first inquiry is whether or not there is a valid arbitration agreement, and then, whether the parties' dispute is within the scope of the arbitration agreement. If there is no valid arbitration agreement or contract to arbitrate, the Court need go no further. The second consideration is whether legal constraints external to the agreement foreclosed arbitration of those claims.<sup>94</sup>

Is there a valid arbitration agreement? The answer is a resounding *NO* for a plethora of reasons. Most notably, there can be no valid arbitration agreement between these parties. The wrong parties were at the table forming the alleged agreement. Cephus was competent, could sign his own name and did not sign or agree. In addition, the arbitration provision collapses when the court evaluates it with an eye to fraud, duress and unconscionability, failing on both substantive unconscionability as well as procedural unconscionability.

Is the parties dispute within the scope of arbitration? In analyzing the facts of this case, if the contract is void from inception, the arbitration clause collapses with the contract. There is no valid arbitration provision. Nothing falls within the scope of this arbitration provision.

### **III. Did Cephus Coleman, Jr.'s Deprivation of Liberty By Grenada Living Center Without Due Process Offend The U.S. Constitution, the Mississippi Constitution or the Mississippi Vulnerable Adults Act?**

Yes. As citizens of the United States, we are entitled to Due Process before we experience deprivation of Life or Liberty. The Mississippi Vulnerable Adults Act was passed to protect our **elderly** from **abuse**. It is abhorrent to this statute for Residents and/or their Responsible Parties to be hoodwinked into nothing short of a complete obliteration of their Constitutional Rights.

Anne was 19 years younger than her half-brother Cephus, Jr. and in fact was not even born when he fought in World War II.<sup>95</sup> No one from Grenada Living Center met with Cephus Coleman, Jr. prior to his wrongful incarceration, so it would have been impossible for them to personally assess his mental competency before they allowed Anne Donaldson to sign the Admission Agreement and rob him of his freedom and constitutional rights.<sup>96</sup> Cephus, Jr. did not agree to assigning his lifetime V.A. benefits to the Grenada Living Center. He did not want to live there. He did not sign the agreement. Despite all of these facts, on July 22, wheelchair bound, he was taken against his will to live and die at the Grenada Living Center. Further, this entire admission process took place while Pete, his son and designated caretaker, was in jail on charges brought by Anne Donaldson. Once admitted to the Grenada Living Center, Cephus Coleman, Jr. was never allowed to leave.

There is a presumption of competency until an individual is adjudicated incompetent. [Miss. Code Ann. § 93-13-255](#) requires certification of “at least two (2) physicians who are duly authorized to practice in this state, or another state or one (1) such physician and a psychologist, licensed in this state or another state, each of whom shall be required to make a personal examination of the subject party, and each of whom shall make in writing a certificate of the result of such examination, which certificate shall be filed with the clerk of the court and become a part of the record of the case.” Prior to a Chancery Court hearing to set up a Conservator or Guardian these requirements must be met. No such proceeding occurred in this case. Cephus Coleman, Jr. at no time was afforded the opportunity to defend the challenge to his competency before a Chancellor or any other Court.

It flies in the face of the U.S. Constitution, the Mississippi Constitution and countless court rulings to deprive a person of life and liberty without due process. Cephus Coleman, Jr was not afforded an opportunity to defend his right to liberty and, ultimately, his life before the Grenada Living Center took him against his will to be detained until his death.

## CONCLUSION

For the reasons stated above, Plaintiff requests this Court to deny the Defendants' Motion to Compel Arbitration.

### Footnotes

- 1 [Miss. Code Ann. § 11-7-13](#) is the Wrongful Death Statute. Under the Statute, Cephus Coleman III is the sole wrongful death beneficiary to the exclusion of Anne Donaldson. The Statute states in relevant part: “Damages for the injury and death of a married man shall be equally distributed to his wife and children,...; and if the deceased has no husband or wife, the damages shall be equally distributed to the children;...”
- 2 Deposition of Cephus Coleman, III - p. 60.
- 3 Deposition of Cephus Coleman, III - p. 61.
- 4 Deposition of Cephus Coleman, III - p. 55.
- 5 Deposition of Anne Donaldson - p. 8.
- 6 Deposition of Cephus Coleman, III - p. 46.
- 7 Deposition of Cephus Coleman, III - p. 17.
- 8 Deposition of Cephus Coleman, III - p. 18.
- 9 Deposition of Cephus Coleman, III - pp. 18, 50.
- 10 Deposition of Cephus Coleman, III - p. 18.
- 11 Deposition of Cephus Coleman, III -pp. 18, 19.
- 12 Deposition of Anne Donaldson - p. 14.
- 13 See Exhibit A- Grenada Police Department Incident Report
- 14 Deposition of Anne Donaldson -pp. 15, 16.

- 15 Deposition of Anne Donaldson - pp. 9, 10, 11, 12.
- 16 Deposition of Cephus Coleman, III - p. 67.
- 17 Deposition of Cephus Coleman, III - p. 75.
- 18 Deposition of Jackie Box- pp. 39, 40; Deposition of Anne Donaldson - p. 15.
- 19 Deposition of Jackie Box - p. 16.
- 20 Deposition of Jackie Box - pp. 17, 18; Deposition of Anne Donaldson - p. 25.
- 21 Deposition of Jackie Box - p. 16.
- 22 Deposition of Cephus Coleman, III - p. 17.
- 23 Deposition of Anne Donaldson - p. 40; Deposition of Cephus Coleman, III - p. 69.
- 24 Deposition of Anne Donaldson - p. 41, Deposition of Cephus Coleman, III - p. 34.
- 25 Deposition of Jackie Box - p. 20.
- 26 See Exhibit B - Admission Agreement
- 27 Deposition of Jackie Box - pp. 19, 20.
- 28 Deposition of Jackie Box - p. 19.
- 29 Deposition of Jackie Box - p. 71.
- 30 Deposition of Cephus Coleman, III - p. 45.
- 31 See Exhibit B - Admission Agreement.
- 32 Deposition of James Williams - p. 59.
- 33 Deposition of James Williams - p. 41.
- 34 See Letter from Mary H. Smith, LSW/Ombudman- Exhibit C.
- 35 Deposition of Cephus Coleman, III - p. 27; See also Letter from Mary H. Smith, LSW/Ombudman- Exhibit C).
- 36 Deposition of Cephus Coleman III - p. 37.
- 37 Deposition of Cephus Coleman III - p. 70.
- 38 See Exhibit D - Police Report.
- 39 Deposition of Cephus Coleman, III - p. 24.
- 40 See Exhibit A -Admission Agreement.
- 41 See Letter from Mary H. Smith, LSW/Ombudman- Exhibit C.
- 42 Deposition of Cephus Coleman, III - pp. 24, 38.
- 43 Deposition of Jackie Box - pp. 31, 32.
- 44 See Exhibit B - Admission Agreement.
- 45 Deposition of Jackie Box - pp. 17, 18; Deposition of Anne Donaldson - p. 25.
- 46 Deposition of Jackie Box - p. 20.
- 47 See Letter from Mary H. Smith, LSW/Ombudman- Exhibit C.
- 48 See Exhibit B - Admission Agreement.
- 49 See Exhibit A - Grenada County Arrest Report
- 50 Deposition of Jackie Box - pp. 17, 18; Deposition of Anne Donaldson - p. 25.
- 51 Deposition of Jackie Box -p.20; Deposition of James Williams - p. 22.
- 52 Deposition of James Williams - p. 41; Deposition of Jackie Box - pp. 17, 19, 20; Deposition of Anne Donaldson - p. 25.
- 53 Deposition of Cephus Coleman, III -p. 27; See also Letter from Mary H. Smith, OLSW/Ombudman- Exhibit C.
- 54 Restatement 2d, § 182.
- 55 517 U.S. 681, 687.
- 56 *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005), quoting *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998).
- 57 *Midland Tar Distillers, Inc. v. M.T. Lotos*, 362 F Supp 1311 (SDNY 1973).
- 58 See Exhibit B -Admission Agreement; See also Letter from Mary H. Smith, LSW/Ombudman- Exhibit C.
- 59 See Exhibit A
- 60 Deposition of Anne Donaldson - p. 15.
- 61 Exhibit B - p. 2, ¶ 5.
- 62 Exhibit B - p. 5, ¶ E.
- 63 See Exhibit F - Internet Research on AHLA.

- 64 Exhibit B - p. 5, ¶ E; p. 6, Section F.
- 65 Deposition of Jackie Box - p. 32.
- 66 *Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Bodylines, Inc.*, 320 F3d 362 (2003 CA2 NY).
- 67 Deposition of Jackie Box - p. 29.
- 68 Deposition of Jackie Box - p.68.
- 69 Deposition of Cephus Coleman III -p. 27.
- 70 See Letter from Mary H. Smith, LSW/Ombudman- Exhibit C.
- 71 Deposition of Cephus Coleman, III - p. 24.
- 72 Deposition of James Williams - p. 59.
- 73 Deposition of Jackie Box - p. 71.
- 74 *J.A. Fay & Egan Co. V. Louis Cohn & Bros.*, 130 So. 290, 292 (Miss. 1930); see also *Evans v. Malone*, 164 So. 2d 794, 797 (Miss. 1964).
- 75 *United Credit Corp., v. Hubbard*, 905 So. 2d 1176 (Miss. 2004) quoting *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 845 (Miss. 2003) citing *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998).
- 76 *Vicksburg Partners, L.P. v Stephens*, No. 204-CA-01345-SCT, quoting *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F.Supp.2d 655 (S.D. Miss. 2000) quoting *York v. Georgia-Pac. Corp.*, 585 F.Supp. 1265, 1278 (N.D. Miss. 1984).
- 77 Deposition of Jackie Box - p. 50.
- 78 Deposition of Jackie Box - p. 50.
- 79 See Letter from Mary H. Smith, LSW/Ombudman- Exhibit C.
- 80 See Exhibit B - Admission Agreement.
- 81 Deposition of Cephus Coleman III - pp. 24, 38, 67.
- 82 *United Credit Corp. v. Hubbard*, 905 So. 2d 1176, citing *Taylor*, 826 So. 2d at 714.
- 83 See Exhibit B - Admission Agreement - p. 5.
- 84 See Exhibit B - Admission Agreement - p. 5, for example.
- 85 *Ore & Chemical Corp. V. Stinnes InterOil, Inc.*, 606 F. Supp. 1510 (SDNY 1985).
- 86 *Vicksburg Partners*, at 17, quoting *Entergy Miss., Inc.* 726 So.2d at 1207.
- 87 *Pitts v. Watkins*, 905 So. 2d 553 (Miss. 2005), quoting *East Ford*, 828 So. 2d at 714.
- 88 See Exhibit B - Admission Agreement - pp. 2, 5.
- 89 See Exhibit B - Admission Agreement - p. 5.
- 90 *York v. Georgia-Pac. Corp.*, 585 F.Supp. at 1278. See also *United Credit Corp. v. Hubbard*, citing *Taylor*, 826 So. 2d at 714)
- 91 *Vicksburg Partners v. Stephens*, at 15.
- 92 *East Ford* at 713.
- 93 *Gatlin*, 848 So. 2d at 842.
- 94 *Doleac v. Real Estate Professionals, LLC*, No. 2004-CA-00902-SCT (June 16, 2005).
- 95 Deposition of Anne Donaldson Deposition - p.17.
- 96 Deposition of Jackie Box - p. 19.